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No. 87-

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

STATE OF CONNECTICUT, CITY OF NEW YORK, NATIONAL LEAGUE OF CITIES, and AMERICAN CIVIL LIBERTIES UNION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether under section 623 of the Cable Communications Policy Act of 1984, the Federal Communications Commission properly determined that state and local governments may not regulate basic cable service rates charged by cable systems in any community where three over-the-air broadcast signals are theoretically available — a determination that in effect deregulates such rates in more than 90 percent of the communities in the United States served by cable — on the ground that such cable systems face "effective competition"?

LIST OF ALL PARTIES

In addition to the parties identified in the caption of this case, there were a number of other petitioners in the United States Court of Appeals. These were: Cable Television Access Coalition, Inc.; County of Contra Costa, California; Guam Cable T.V.; National Federation of Local Cable Programmers and the New York Citizens' Committee for a Responsible Media; Satellite Television Industry Association, Inc./(SPACE).

The following parties were intervenors in the Court of Appeals: Adams-Russell Cable Services Division of Adams Russell; Arizona Cable Television Association; Association of Independent Television Stations, Inc.; BellSouth Corporation; Board of Supervisors of Fairfax County, Virginia; Cellular Telecommunications Division of Telocator Network of America; Centel Corporation; Gary L. Christensen; City of Athens, Ohio; City of Dubuque, Iowa; City of Los Angeles, California; City of Miami, Florida; Cities of Sunnyside and Grandview, Washington and the City of Southfield, Michigan; Cox Cable Communications, Inc.; Direct Satellite Communications, Inc.; Gill Industries and Western Communications, Inc.; Eagle Telecommunications, Inc./Colorado; Harron Communications Corporation; Maximum Service Telecasters, Inc.; Media General Cable of Fairfax County, Inc.; National Association of Broadcasters; National Association of State Cable Agencies; National Cable Television Association, Inc. and Community Antenna Television Association; North Carolina CATV Association; Office of Communication of the United Church of Christ; Post-Newsweek Cable, Inc.; Tele-Communications, Inc.; Texas Cable TV Association; Time Incorporated; and United Cable Television Corporation.

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Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled proceeding on July 17, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit upholding, in large measure, the FCC's rule deregulating basic cable service rates in most communities throughout the United States is reported at 823 F.2d 1554 and is reprinted in the Appendix at page A115.

The FCC's *Report and Order* adopting the rule under review in this proceeding is published at 50 Fed. Reg. 18,637 (May 2, 1985) and is reprinted in the Appendix at page A1. The *Report and Order* was later modified by the FCC's *Memorandum Opinion and Order* published at 51 Fed. Reg. 21,770 (June 16, 1986) and reprinted in the Joint Appendix at page A96.

JURISDICTION

The judgment of the Court of Appeals was entered July 17, 1987. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1). The petition has been filed within the time allowed by law.

STATUTORY PROVISIONS

The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) is codified at 47 U.S.C. § 521 *et seq.* (Supp. 1987). Relevant portions of the Cable Act are reprinted in the Appendix at page A186.

STATEMENT OF THE CASE

(1)

This appeal raises the question whether the Federal Communications Commission has the power, after enactment of the Cable Communications Policy Act of 1984, to deregulate basic cable service rates in more than 90 percent of the communities in the United States served by cable.

Section 623 of the Cable Act prohibits regulation of basic cable service rates wherever cable systems are subject to "effective competition." 47 U.S.C. § 543(a), (b)(1). In April 1985, the Federal Communications Commission (FCC) promulgated a rule defining "effective competition" for a cable system as the theoretical availability of three over-the-air broadcast signals somewhere in the franchise territory served by the cable system, irrespective of the number and nature of programming services offered over the cable system. Because almost every community served by cable has at least three theoretically available broadcast signals, the FCC's rule in effect deregulates basic cable service rates in the overwhelming majority of cabled communities in the United States. *See* National League of Cities Comments to FCC MM Docket No. 84-1296, Appendix III at 19, ¶ 30-31.

Petitioners, along with other state and local governments and citizen groups, challenged the FCC's rule in the United States Court of Appeals for the District of Columbia Circuit, contending that it exceeded the FCC's authority under the Cable Act and was arbitrary and capricious. With limited exceptions not relevant here, the Court of Appeals rejected that challenge. Petitioners here contend that the Cable Act required the FCC to promulgate a rule defining "effective competition" for a cable system that at least required consideration of whether competition existed for "basic cable service" as that term is statutorily defined; that the FCC improperly ignored a relevant factor — antitrust market analysis; and that it erroneously relied upon three flawed studies in

promulgating its "effective competition" rule. The net result of these errors, in petitioners' view, is that the FCC has put into effect a rule that overlooks unambiguous Congressional intent and improvidently deprives state and local governments of their traditional authority to protect cable subscribers from monopoly pricing.

(2)

There are approximately 7800 cable systems in the United States. "Cable TV," *Consumer Reports,* Sept. 1987, at 547–48. Improvements in distribution technology over the past decade have greatly expanded the range of programming services available to the average cable subscriber. Most cable subscribers are now served by cable systems offering at least 30 channels of video programming services, many of which are delivered via satellite from distant sources. Over 50 satellite-delivered programming services are available to cable systems throughout the United States. *Id.* These satellite-delivered programming services offer video programming largely unavailable from over-the-air broadcast television, including channels featuring recent theatrical or made-for-cable movies (e.g., Home Box Office, Showtime), cultural programming (e.g., Bravo, Arts & Entertainment), children's programming (e.g., the Disney Channel, Nickolodeon), musical programming (e.g., MTV, the Nashville Network), exclusive sports coverage (e.g., ESPN, Home Sports Team), other special-audience programming (e.g., the Discovery Channel, Black Entertainment Television), 24-hour news and weather services (e.g., Cable News Network, the Weather Channel), 24-hour public affairs services (e.g., C-SPAN), and even distant broadcast signals known as superstations (e.g., WTBS-Atlanta, WGN-Chicago). *Id.* at 549–50. In addition, about one-fifth of all cable systems also offer local public, educational, and governmental ("PEG") access channels that televise local government hearings, classroom instruction, and programs featuring community groups. *Id.* at 550. Altogether, cable subscribers typically receive at least ten channels of programming which cannot be received from over-the-air broadcast television. *Id.* at 548.

The growing importance of cable television is reflected in the significant growth in the number of cable subscribers over the past decade. Whereas in 1977 only 18 percent of all television households subscribed to cable service, by the end of 1987 more than 50 percent of all television households will subscribe to cable service. "Cable Stats," *Cablevision*, Sept. 28, 1987, at 64.

The average cable subscriber may subscribe to "basic cable service" for one monthly fee and one or more "pay" services for additional monthly fees. "Pay" services typically consist of single channels of programming featuring theatrical and made-for-cable movies and exclusive coverage of sporting events (e.g., Home Box Office). "Basic cable service," on the other hand, typically consists of a number of programming services provided to cable subscribers as a package including not only local over-the-air broadcast signals, but also a wide array of satellite-delivered programming services uniquely available over cable (e.g., Arts & Entertainment, Nickelodeon, MTV, the Discovery Channel, Cable News Network, WTBS-Atlanta), and PEG access channels. Basic cable service often includes more than 25 channels of video programming, and some cable systems offer basic cable service packages exceeding 70 channels. "Cable TV," *supra* at 552. In almost all cases, a pay service may be obtained only if the cable subscriber also takes basic cable service. *See Friedman v. Adams Russell Cable Services — New York, Inc.*, 624 F. Supp. 1195, 1196 (S.D.N.Y. 1986). Basic cable service is thus the gateway to the pay services for each cable subscriber.

(3)

Cable television has for many years been regulated at the federal, state and local levels of government. State and local governments have regulated cable television through the process of issuing franchises for a cable system's use of public rights-of-way. Because few cable systems face head-to-head competition for subscribers from other cable systems, franchising authorities have traditionally regulated basic cable service rates to prevent monopoly pricing.

In the mid-1970s, however, the FCC preempted rate regulation of pay channels even though it declined to regulate such rates itself. *Brookhaven Cable TV, Inc. v. Kelly,* 573 F.2d 765 (2d Cir. 1978), *cert. denied,* 441 U.S. 904 (1979). The FCC's preemption-and-deregulation initiatives in the area of cable television greatly accelerated in the early 1980s. In 1983, for example, the FCC attempted to deregulate portions of basic cable service by authorizing cable operators to remove all programming services, other than local broadcast signals and access channels, from the basic cable service tier notwithstanding the contractual requirements of their cable franchises and promises made to obtain those franchises. *Community Cable TV, Inc.,* 98 FCC 2d 1180 (1980). But see *Cox Cable New Orleans, Inc. v. City of New Orleans,* 594 F. Supp. 1452 (E.D. La. 1984) (holding that FCC policy did not excuse cable operators from compliance with franchise requirements governing basic cable service rates), vacated without opinion (E.D. La. Dec. 16, 1985).

(4)

Congressional concern about the FCC's accelerating preemption-and-deregulation initiatives in the area of cable television was a major factor in prompting Congress to pass the Cable Act, the first comprehensive federal legislation for cable television. As Congressman Markey, a principal cosponsor of the bill that became the Cable Act, observed:

> Everyone . . . should understand that if the House fails to pass a Federal cable policy, then our cities will be robbed of their control over cable TV. The era of deregulation, affirmed by the FCC and the Supreme Court, has hit cable regulation with a crippling force. . . . [W]e should be bold in our stance in support of the cities and the consumers. We should pass this compromise since it is good for consumers and fair to the cities and the cable industry.

130 Cong. Rec. H 10,444 (daily ed. Oct. 1, 1984).

The "compromise" Cable Act resulted from three years of negotiations among "the cities, the cable industry, and many others." 130 Cong. Rec. H 10,435 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth, who had introduced the bill that became the Cable Act). The Cable Act was viewed by Congress as "a reasonable compromise which protects the interests of not only the cities and the cable industry, but those of the consumers of cable services as well." 130 Cong. Rec. S14,284 (daily ed. Oct. 11, 1984) (statement of Sen. Gorton).

The heart of the compromise was a clear delineation of regulatory authority at each level of government — federal, state and local. H.R. Rep. No. 934, 98th Cong., 2d Sess. 24 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4661 ("House Report"). Congress expressly departed from the direction taken by the FCC immediately prior to the Cable Act by declaring "*continue[d] reliance on the local franchising process as the primary means of cable television regulation;* while defining and limiting the authority that a franchising authority may exercise through the franchise process." House Report at 19 (emphasis added), *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4656. Simultaneously, Congress made clear that the FCC could no longer deregulate or preempt regulation of cable services pursuant to the broad powers that it had previously exercised under the general provisions of the Communications Act of 1934. *Compare United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) *with* 47 U.S.C. § 152(a) (Supp. 1987).

As compromise legislation, the Cable Act reflected a careful balance of a number of different and often conflicting considerations. No interest group — cable operators, franchising authorities, or consumers — obtained everything that it had sought through the legislative process. The Cable Act thus did not contemplate total deregulation, as is evident from two of its six stated purposes: to "establish franchise procedures and standards which encourage the growth and development of cable systems *and which assure that cable systems are responsive to the needs and interests of the local*

community" and to "promote competition in cable communications and minimize *unnecessary* regulation that would impose an undue economic burden on cable systems." 47 U.S.C. §§ 521(2), (6) (emphasis added). To assure that cable systems are responsive to the needs and interests of the local community, the Cable Act both authorizes and requires continuing regulation of cable systems. For example, "a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides." 47 U.S.C. § 541(a)(3). Congress recognized that such regulation promoted First Amendment interests:

> [A]ccess to telecommunications networks has become increasingly important to full participation in the political, economic, social and cultural life of the nation. The First Amendment's guarantee of a free flow of diverse ideas will be reduced to an empty promise if access to information is not available to all of our citizens.

House Report at 36, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4673.

(5)

This case concerns Section 623 of the Act, 47 U.S.C. § 543, which establishes and delimits the power of franchising authorities to regulate cable rates. Section 623 permits franchising authorities to regulate the rates for "basic cable service" in those markets where the "cable system" does not face "effective competition." 47 U.S.C. § 543(b). The Act does not itself define "effective competition" but instead directs the Commission to adopt rules that will "define the circumstances in which a cable system is not subject to effective competition." 47 U.S.C. § 543(b)(2)(A). Congress clarified that directive in the House Report:

> In determining whether [a] cable system is subject to effective competition for the purpose of regulation of basic cable service, *the FCC should consider the number and nature of services provided, compared with the number and nature of services available from alternative sources and, if so, at what price.* In establishing the necessary regulations, the FCC should establish objective nationwide criteria which are readily applicable for determining on a community-by-community basis whether a cable system is subject to effective competition . . . . *The commission may find it relevant to consider factors in addition to the number of over-the-air broadcast stations in a market,* such as the penetration rate of the cable system.

House Report at 66, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4703 (emphasis added).

(6)

On December 11, 1984, the FCC released its *Notice of Proposed Rulemaking ("Notice")* to implement several provisions of the Cable Act, including § 623. 49 Fed. Reg. 48,765 (Dec. 14, 1984). Although Section 623 required it to define "effective competition" for a "cable system," the FCC proposed to define "effective competition" for "basic cable service" alone. *Notice* at ¶¶ 43 and 45.[1] The FCC, moreover, did not propose to define "effective competition" for "basic cable service" as the latter term was defined by the Cable Act, namely, any service tier that "includes" retransmission of local broadcast signals. 47 U.S.C. § 522(2). Nor did it propose to do so according to the economic reality that many cable systems include numerous nonbroadcast signals in their basic cable service package. Instead, the FCC observed:

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[1] "Basic cable service" is defined as "any service tier which includes the retransmission of local broadcast signals." 47 U.S.C. § 522(2). A "cable system" is defined in relevant part as "a facility consisting of a set of closed transmission paths and associated . . . equipment that is designed to provide cable service" but does not include systems only retransmitting broadcast signals. 47 U.S.C. § 522(6).

> In essence, basic cable service is the provision of locally viewed broadcast signals and required access channels. *While basic service can now contain additional programming (such as superstations or cable satellite networks) it need not, as a matter of definition.*

Notice at ¶ 43 (emphasis added). Having bypassed the statutory definition of basic cable service as well as the economic realities under which basic cable service is offered, the FCC proposed to define "effective competition" for basic cable service as the theoretical availability of four over-the-air broadcast signals. *Id.* It sought public comments on the proposed four-signal "effective competition" rule.

In comments and reply comments filed in response to the *Notice*, several state and local governments, citizen groups and other parties — including not only Petitioners here but also the Antitrust Division of the United States Department of Justice ("DOJ") — strongly opposed the FCC's proposal. They explained that the presence of a small number of broadcast signals in a community was not, by itself, sufficient to preclude cable operators from charging unreasonable rates for basic cable service. Relying upon antitrust market analysis, these parties, most notably DOJ, urged the FCC to recognize that its proposed definition of "effective competition" overlooked at least one source of any cable system's market power — the additional signals provided by a cable system within its basic cable service tier that are unavailable via over-the-air broadcast television.

By contrast, the cable industry commentors, including the National Cable Television Association ("NCTA") and the Community Antenna Television Association ("CATA"), urged the FCC to adopt an "effective competition" rule defined as two over-the-air broadcast television signals. In jointly filed comments, NCTA and CATA offered the results of a limited empirical study of 88 cable systems whose rates were either totally or partially deregulated. In reply comments, however,

several parties, including DOJ, pointed out a number of methodological flaws in the NCTA/CATA study that brought into question the reliability of its results.[2]

In its *Report and Order,* released on April 19, 1985, the FCC adopted a rule defining "effective competition" as the availability of three over-the-air broadcast signals. *Report and Order* at ¶ 99 (App. A45). It relied upon the NCTA/CATA study, noting that it "was cited by many as providing factual support for a standard based on fewer than three signals," *id.* at ¶ 97 (App. A43), without ever addressing the significant criticisms of that study. It also relied upon an internal staff study of certain cable subscriber viewing data and an empirical study of certain manufacturing industries, both of which were mentioned for the first time in the *Report and Order. Id.* at ¶ 99 (App. A45–46). The details of the internal staff study remained undisclosed until the FCC reluctantly released selective portions of that study pursuant to Freedom of Information Act requests. Even then, it continued to withhold critical details of the study's methodology, such as how various cable markets had been "randomly" chosen as samples. The results of the study, moreover, did not establish that cable systems had no ability to engage in monopoly pricing in a community in which three broadcast signals were theoretically available.[3] Likewise, the empirical study of certain

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[2] First, 41 percent of the cable systems sampled in the NCTA/CATA study were *not* randomly selected, thus creating a potential source of bias. Second, some unspecified number of sampled systems served multiple communities, at least one of which regulated basic cable service rates. For such cable systems, it was unclear whether the basic cable service rate was determined by market forces in one community or regulation by another community. These were but two of seven or eight significant questions raised concerning the NCTA/CATA methodology.

[3] The FCC staff purported to find that in communities having three or more over-the-air broadcast signals, cable subscribers spent more time watching those signals than other video programming services available over the cable. But the fact that basic cable service programming other than local broadcast signals only commands a particular viewing share in cable households is irrelevant to the pertinent question whether a cable operator

(continued)

manufacturing industries did not establish the absence of such market power in three signal communities.[4]

In its *Report and Order* the FCC refused to apply antitrust market analysis to the problem at hand. It dismissed DOJ's antitrust market analysis proposals, noting only that "several parties" had "state[d] that DOJ provides little justification other than supposition and intuition." *Id.* at ¶ 97.[5] In

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[3] *(continued)*
has market power. "Market power can be viewed as the ability of a firm to deviate profitably from marginal cost pricing." H. Hovenkamp, *Economics and Federal Antitrust Law* 57 (1985). Even if cable households allot only 20 percent of viewing time to non-broadcast programming, those households may have such a strong preference for that programming that they will continue to subscribe to basic cable service despite drastic price increases.

[4] Kwoka, "The Effect of Market Share Distribution in Industry Performance," *Review of Economics & Statistics,* Vol. LXI, No. 1, Feb. 1979, pp. 101-09. According to the FCC, the Kwoka study "demonstrated that the presence of a third competitor of sizable market share may be sufficient to guarantee competition in a given industry." *Report and Order* at ¶ 99 (App. A45). However, Kwoka himself cautioned against generalizing his study results beyond the five manufacturing industries examined because these industries possessed special characteristics. Kwoka, *supra* at 107 n.15. Likewise, other commentators have noted that Kwoka's study is "more suggestive than definitive, because of the effects of price controls during part of the period under scrutiny." Posner & Easterbrook, *Antitrust: Cases, Economic Notes and Other Material* 42 (Supp. 1984).

[5] Although the comments of DOJ, petitioners and other parties relied on antitrust market analysis, the FCC never once mentioned that fact. Interestingly, on the very day that it released the *Report and Order,* the FCC released another document in an unrelated proceeding in which it stated that assessment of market power *requires* an antitrust market analysis. *Notice of Proposed Rulemaking, International Competitive Carrier Policies,* 100 FCC 2d 1270, 1275-82 (1985). In that *Notice of Proposed Rulemaking,* the FCC observed that "to determine the market power of a given firm, we must first define the relevant market." 100 F.C.C. 2d at 1275 (footnote omitted). Two products are deemed within the same product market if they are "functionally similar." *Id.* Pertinent factors include "substitutability in use." *Id.* "Cross-elasticity of demand can be used to determine substitutability in use [but] most cases have relied on practical indicia of this concept such as peculiar characteristics and uses and reasonable interchangeability. See *U.S. v. Brown Shoe Co.,* 370 U.S. 294 (1962)." *Id.* at 1275 n.15. By contrast, although the FCC in this case purported to assess cable operators' market power, it never even attempted to define the relevant product market for "basic cable service."

lieu of an antitrust market analysis to assess a cable system's market power, the FCC chose to "favor a presumption that competition does in fact exist rather than to assume that consumers will make no effort to seek out alternatives to basic cable service." *Id.* at ¶ 107 (App. at A50). This presumption apparently derived from the FCC's belief "that it was the intent of the Cable Act to significantly deregulate the provision of cable service." *Id.* at ¶ 100 n.69 (App. at A47).

Certain parties sought FCC reconsideration of aspects of the *Report and Order* unrelated to rate regulation. On May 30, 1986, the FCC issued its *Memorandum Opinion and Order* denying the petitions for reconsideration.

(7)

After reviewing the circumstances leading to enactment of the Cable Act, the Court of Appeals observed that the Act reflected a balance of competing considerations:

> In establishing regulatory guidelines, Congress was concerned *both* with relieving the cable industry from unnecessary, burdensome regulation *and* with ensuring that cable systems remain responsive to the needs of the public. *See* § 601(2), (4), (6), 47 U.S.C. § 521(2), (4), (6). Our task in this case is to decide whether the rules adopted by the FCC have impermissibly altered the balance struck by Congress.

(App. A131–32). Although the FCC's "effective competition" rule deregulated basic cable service rates in most communities in the United States — a fact not mentioned in the Court of Appeals' opinion — the Court of Appeals found that the rule did not impermissibly alter the balance struck by Congress in the Cable Act. The Court of Appeals also observed that Section 623 required the FCC to " 'define the circumstances' in which a cable system is not subject to 'effective competition.' " (App. A132). But it did not explain why the FCC could define "effective competition" for "basic cable

service" alone. Crucially, the Court of Appeals held that the FCC could not depart from the precise statutory definition of "basic cable service." 47 U.S.C. § 522(2). (App. A155). Indeed, the Court found error in the FCC's deviation from that definition with regard to the agency's determination of which tiers of service are subject to regulation. (App. A155). But, curiously, the Court overlooked the FCC's departure from this definition with regard to its determination of a standard for "effective competition."

The Court of Appeals noted that the three-signal "effective competition" rule had been adopted by the FCC "[b]ased on the comments submitted by the various parties, an internal staff study and materials drawn from the economic literature. . . ." (App. A135). With a few exceptions not relevant here, it held that: "the FCC addressed the significant comments made in the rulemaking proceeding, articulated the basis for its conclusion, and adopted rules that are at a minimum 'reasonable.' " (App. A143). The Court, however, never explained why the comments by DOJ and others proposing an antitrust market analysis and criticizing the NCTA/CATA study were so insignificant they need not be addressed at all by the FCC. Nor did the Court of Appeals explain why the rule was reasonable despite the FCC's reliance on two irrelevant studies, neither of which had even been mentioned in the *Notice* and one of which remained largely undisclosed.[6]

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[6] Having upheld the FCC's "effective competition" rule, the Court of Appeals remarked that the FCC's "predictive judgment" was "based on the evidence it had accumulated in the relatively short time frame within which Congress directed the agency to complete its rulemaking." (App. A144). In fact, although the FCC was required to fashion its rule within 180 days after enactment of the Cable Act, the FCC had an additional 15 months to revisit its rule while it deliberated on various petitions for reconsideration. (App. A96). The Court of Appeals further observed that given "the tentative nature of its predictive judgment," the FCC must "vigilantly monitor the consequences of its rate regulation rules." (App. A145). To date, more than two years after the three-signal rule was adopted, the FCC has yet to open a formal proceeding to review the effects of that rule.

REASONS FOR GRANTING THE WRIT

THE FCC COMMITTED PROCEDURAL AND SUBSTANTIVE ERRORS THAT WILL HAVE PERVASIVE NATIONWIDE IMPACT, WILL PREEMPT STATE AND LOCAL GOVERNMENTS OF TRADITIONAL CABLE RATE REGULATION POWERS, AND WILL EXPOSE CABLE SUBSCRIBERS TO MONOPOLY PRICING.

Petitioners submit that in several ways the FCC's process of and end result in defining the standard of "effective competition" departed significantly from the proper approach to implementation of the Cable Act. But this case is not merely one in which the agency and the court below committed procedural and substantive errors. Rather, it is one in which procedural and substantive errors will have sweeping nationwide impact, will preempt state and local governments in an area in which they have traditionally exercised authority, and will subject cable subscribers to the hazards of a market that is effectively competitive only according to the FCC. It is in this context that this Court should consider plenary review of the errors described below.

1. The Opinion Below Sanctions A Significant Departure From The Accepted And Usual Doctrine That Requires Agencies To Construe Statutes In Accordance With The Unambiguously Expressed Intent Of Congress.

This Court has recently clarified the judicial role in reviewing the construction of a statute by an agency charged with its enforcement:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the

> matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (footnote omitted). "The starting point of analysis is the language of the statute itself." *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 508 (1981), citing *Steadman v. SEC*, 450 U.S. 91, 97 (1981) and *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

In the present case, however, the Court of Appeals — without acknowledging this doctrine — sanctioned the FCC's two-fold deviation from unambiguous statutory language. First, the FCC, instead of defining "effective competition" for a "cable system," as required by Section 623 of the Cable Act, defined "effective competition" for "basic cable service" alone. Second, and perhaps more significantly, the FCC did not even pause to use the statutory definition of the "basic cable service" standard upon which it erroneously relied. From the outset, the FCC defined "basic cable service" solely in terms of broadcast signals. It thus excluded all non-broadcast programming (except access channels) from "basic cable service." The Cable Act, however, defines "basic cable service" to mean "any service tier which *includes* . . . broadcast signals." 47 U.S.C. § 522(2) (emphasis added). According to this statutory definition, "basic cable service" is not limited to broadcast signals but includes non-broadcast programming. In effect, the FCC simply chose to administratively rewrite the statutory definition of "basic cable service" so as to include the limiting phrase "but excludes non-broadcast programming."[7]

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[7] Given that the Court of Appeals found the FCC to have erred by not following the statutory definition of "basic cable service" in determining which tiers of service are subject to regulation, the Court's failure to find a similar erroneous deviation from the statutory definition in determining a standard for "effective competition" is especially puzzling.

While Congress expressly delegated the task of defining "effective competition" to the FCC, it precisely instructed the FCC to "consider the number and nature of [cable] services provided, compared with the number and nature of services available from alternative sources and, if so, at what price." House Report at 66, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4703. The Court of Appeals nevertheless deemed that instruction to be virtually nullified by subsequent language in the House Report stating that the FCC "*may* find it relevant to consider factors in addition to the number of over-the-air broadcast stations in a market . . . ." *Id.* (emphasis added). But the subsequent statement and earlier instruction are reconcilable: together, they mean that the FCC should consider the number and nature of cable services provided, compared with what is available from alternative sources and, having done so, may find it relevant, i.e., necessary, to fashion an "effective competition" rule based on factors in addition to the number of available broadcast signals.[8]

If there were any doubt that the three-signal "effective competition" rule was contrary to unambiguous Congressional intent, that doubt is removed by the fact that Congress specifically rejected a statutory definition of "effective competition" based on four broadcast signals contained in the cable bill initially passed by the Senate and later replaced by the bill that became the Cable Act.[9] " 'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.' " *Immigration and Naturalization Service v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1219 (1987), quoting *Nachman Corp.*

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[8] Indeed, it seems almost dispositive of the question whether the FCC could disregard the non-broadcast component of cable service to observe that a system that only retransmits broadcast signals is not even a "cable system" under the Cable Act. 47 U.S.C. § 522(6).

[9] S. 66, 98th Cong., 1st Sess. § 607 (1983). *See* 129 Cong. Rec. § 8326 (daily ed. June 14, 1983), S. Rep. No. 67, 98th Cong. 1st Sess. 22-23 (1983)).

v. Pension Benefit Guaranty Corp., 446 U.S. 359, 392–93 (1980) (Stewart, J., dissenting). Congressional rejection of the proposed four broadcast signal definition provides strong evidence that Congress did not intend to authorize promulgation of a three broadcast signal rule either.

2. The Opinion Below Sanctions A Significant Departure From The Accepted And Usual Doctrine That Requires Agencies To Consider All Relevant Factors And Explain Departures From Longstanding Policies.

Administrative agencies must consider all relevant factors in fashioning their rules. *Motor Vehicle Manufacturers Association of United States, Inc. v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 43 (1983); *Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Failure to consider a relevant factor is arbitrary and capricious. Likewise, administrative agencies must provide a reasoned analysis when they depart from longstanding policies, and failure to do so is arbitrary and capricious. *Motor Vehicle Manufacturers Association of United States, Inc.*, 463 U.S. at 57. The Court of Appeals ignored both principles in upholding the FCC's three broadcast signal rule.

Antitrust principles were surely a relevant factor for the FCC to consider in assessing the market power of cable systems. *Direct Marketing Association, Inc. v. United States Postal Service*, 778 F.2d 96, 105 (2d Cir. 1985); *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 959 (D.C. Cir. 1968). Although various parties suggested that the FCC apply antitrust market analysis to the "effective competition" issue, the FCC completely ignored those suggestions. The FCC went so far as to dismiss, as based upon "supposition and intuition," the analysis of DOJ, the agency recognized as having greatest expertise at the federal level in evaluating competition in telecommunications markets. The FCC's failure in this regard was especially arbitrary because the FCC has

traditionally applied antitrust market analysis to assess the degree of competition in telecommunications markets. *See, e.g., Fourth Report and Order, Policy and Rules Concerning rates for Competitive Common Carrier Services and Facilities Authorization Therefor,* 95 FCC 2d 554, 557–82 (1983); *Notice of Proposed Rulemaking, International Competitive Carrier Policies,* 100 FCC 2d 1270, 1275–82 (1985); *Notice of Proposed Rulemaking, Decreased Regulation of Certain Basic Telecommunications Services,* 2 FCC Rcd 645, 647 (1987). The FCC thus also acted arbitrarily by failing to provide any explanation, let alone a reasoned one, for its departure from its traditional mode of analysis.

Rather than undertake a principled analysis of the effective competition question, the FCC relied on a presumption of competition. This presumption apparently derived from its erroneous view of the Cable Act as a deregulatory manifesto — a view that disregarded other important goals of the Cable Act, including "maximizing the availability of cable services. . . ." *Housatonic Cable Vision v. Dept. of Public Utility,* 622 F. Supp. 798, 811 (D.C. Conn. 1985). As with antitrust market analysis, the FCC treated this important statutory goal as simply another irrelevant factor.[10]

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[10] Interestingly, the FCC, in selectively quoting from the section of the Cable Act defining the Act's purposes, observed that:

> "Foremost among these [purposes] is the intent of the statute to establish 'standards which encourage the growth and development of cable systems *** assure that cable communications provide *** the widest possible diversity of information sources and services to the public' and 'promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.' We believe that we must implement Section 623(b) consistent with these statutory goals." *Report and Order* at ¶ 116. (deletions in original) (App. at A55–56).

Apparently because of the seeming conflict with its deregulatory mindset, the FCC deleted mention of the goal of "assur[ing] that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2).

3. The Opinion Below Sanctions A Significant Departure From The Accepted And Usual Doctrine That Prohibits An Agency From Relying On Studies Which Are Irrelevant, Undisclosed, Or Lacking Statistical Validity.

" 'It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that [in] critical degree, *is known only to the agency.*' " *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 251 (2d Cir. 1977) (emphasis in original), *quoting Portland Cement Association v. Ruckelhaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (2d Cir. 1986). Nor may an agency rely upon a study that has been criticized in public comments as being statistically unreliable, without at least addressing the statistical criticisms. *St. James Hospital v. Heckler*, 760 F.2d 1460, 1469 (7th Cir.), *cert. denied*, 106 S.Ct. 229 (1985). Likewise, an agency may not rely upon a study to support findings unrelated to the study's results. *Bowen v. American Hospital Association*, 106 S.Ct. 2101, 2115 & n.18 (1986) (Stevens, J., plurality); *St. James Hospital v. Heckler*, 760 F.2d at 1468; *Almay v. Califano*, 569 F.2d 674, 682 (D.C. Cir. 1978).

The Court of Appeals entirely ignored the FCC's violation of all three of these principles. First, the FCC relied upon the NCTA/CATA study without ever addressing the significant criticisms of that study. Second, it relied upon an internal study virtually unavailable for public comment. Third, it relied on two studies, its internal study and the Kwoka study, which were plainly irrelevant to the pertinent question whether cable systems possess market power. Had these violations not occurred, the result of the rule-making process may have been very different, and state and local governments throughout the country may have retained their traditional authority to safeguard cable subscribers against the possibility of monopolistic cable rate pricing.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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